Supreme Court, U.S.
FILED
AUG 31 2001
CLERK

(3)

No. 00-1745

In The

Supreme Court of the United States

ARLENE M. COOPER and CALVIN STOUDT,

Petitioners,

v.

CONNIE G. POWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JAMES E. DOYLE
Attorney General

Mary D. Batt*
Assistant Attorney General
Attorneys for Petitioners
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707
(608) 266-1001

**Counsel of Record*

16 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

I. IN THE LOWER COURT DECISION IS APPROPIATE FOR REVIEW. 1

II. STATE AND FEDERAL COURTS ARE DIVIDED AND CONFUSED ON WHETHER THERE IS A CONSTIIUTIONALLY PROTECTED PROPERTY INTEREST IN CONTINUING A POST-SECONDARY EDUCATION. 3

III. THE LOWER COURTS IMPROPERLY RECOGNIZED A SUBSTANTIVE DUE PROCESS RIGHT TO REVIEW OF ACADEMIC DECISIONS 7

IV. A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN CONTINUING A POST-SECONDARY EDUCATION WAS NOT CLERALY ESTABLISHED IN 1991 8

CONCLUSION 10

CASES CITED

Abbariao v. Hamline University School of Law,
258 N.W. 2d 108, 112 (Minn. 1977).....4, 5

Akins v. Board of Governors of
State Colleges and Universities,
840 F.2d 1371 (7th Cir. 1988),
vacated on other grounds,
488 U.S. 920 (1988).....4, 6, 8, 9

Albright v. Oliver,
510 U.S. 266 (1994).....7

Anderson v. University of Wisconsin,
665 F. Supp. 1372 (W.D. Wis. 1987),
aff'd 841 F.2d 737 (7th Cir. 1988).....4

Behrens v. Pelletier,
516 U.S. 299 (1996).....3

Bishop v. Wood,
426 U.S. 341 (1976).....6

Board of Curators of Univ. of
Missouri v. Horowitz,
435 U.S. 78 (1978).....4, 7, 8

Commissioner v. McCoy,
484 U.S. 3 (1987).....2

Durant v. Essex Co.,
7 Wall. 107 (1869).....2

Evans v. West Virginia Board of Regents,
165 W. Va. 780, 271 S.E.2d 778,
(W.Va. 1980).....4

Fox River Co. v. Railroad Commission of Wisconsin,
274 U.S. 651 (1927).....2

Frank v. Marquette University,
209 Wis. 372,
245 N.W. 125 (1932).....5

Gaspar v. Bruton,
513 F. 2d 843 (10th Cir. 1975).....4, 5

Hall v. University of Minnesota,
530 F. Supp. 104 (D. Minn. 1982).....5

Harris v. Blake,
798 F.2d 419 (10th Cir. 1986).....5, 6

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993).....2

Johnson v. U.S.,
520 U.S. 461 (1997).....2

Landstrom v. Illinois Dep't of Children,
892 F.2d 670 (7th Cir. 1990).....9

Martin v. Helstad,
578 F. Supp. 1473 (W.D. Wis. 1983).....4, 6

Martin v. Helstad,
699 F. 2d 387 (7th Cir. 1983).....4, 6

Maryland v. Baltimore Radio Show, Inc.,
338 U.S. 912 (1950) 2

Neil v. Biggers,
409 U.S. 188 (1972) 2, 3

Osteen v. Henley,
13 F.3d 221 (7th Cir. 1993) 6, 9

Regents of Univ. of
Michigan v. Ewing,
474 U.S. 214 (1985) 4, 7, 8

Schlesinger v. Reservists Committee
To Stop The War,
418 U.S. 208 (1974) 2

Shudooh v. University of Wisconsin-Madison,
(Case No. 00-C-0267-C) (W.D. Wis.,
April 4, 2001) (Unpublished) 6

Siblerud v. Colorado State Board of Agriculture,
896 F. Supp. 1506
(D. Colo. 1995) 4

Smith v. U.S.,
502 U.S. 1017 (1991) 2

Stevens v. Hunt,
646 F. 2d 1168 (6th Cir. 1981) 4

Stoller v. College of Medicine,
562 F. Supp. 403, (M.D. Pa. 1983),
aff'd per curiam without decision,
727 F. 2d 1001 (3d Cir. 1984) 4

Supreme Court of New Hampshire. v. Piper,
470 U.S. 274 (1985) 2

Taylor v. Mississippi,
319 U.S. 583 (1943) 2

U.S. v. Salerno,
481 U.S. 739 (1987) 5

Unger v. National Residents Matching Program,
928 F. 2d 1392 (3d Cir. 1991) 4

Washington v. Glucksberg,
521 U.S. 702 (1997) 7

No. 00-1745

In The

Supreme Court of the United States

ARLENE M. COOPER and CALVIN STOUDT,

Petitioners,

v.

CONNIE G. POWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

I. THE LOWER COURT DECISION IS APPROPIATE FOR REVIEW

Connie Powell argues this Court should deny the petition for *certiorari* because the decision below was evenly divided and has no precedential value. To the contrary, the lower court decision is binding on these petitioners. An

evenly split decision from an appellate court results in the underlying lower court decision having "full force" as a final order. *Durant v. Essex Co.*, 7 Wall. 107, 112 (1869), *quoted in Neil v. Biggers*, 409 U.S. 188, 192 (1972).

Moreover, neither an evenly divided lower court decision, nor the fact that the lower court decision lacks value as precedent, precludes the grant of *certiorari* by this Court. This Court has routinely granted *certiorari* to review evenly divided decisions of state supreme courts and federal courts of appeal. *See, e.g, Fox River Co. v. Railroad Commission of Wisconsin*, 274 U.S. 651, 654 (1927); *Taylor v. Mississippi*, 319 U.S. 583, 585(1943); *Supreme Court of New Hampshire. v. Piper*, 470 U.S. 274, 278 (1985).

Similarly, this Court has reviewed numerous unpublished lower court decisions, regardless of their value as precedent. As Justice Blackmun stated in *Smith v. U.S*, 502 U.S. 1017, 1020 n.1 (1991) (*dissenting on other grounds*), "the fact that the Court of Appeals' decision is unpublished is irrelevant" to the Court's decision to accept review. *See also, Commissioner v. McCoy*, 484 U.S. 3, 7 (1987); *Johnson v. U.S.*, 520 U.S. 461, 465 (1997); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993); *Schlesinger v. Reservists Committee To Stop The War*, 418 U.S. 208, 209 (1974).[1]

---

[1] Contrary to Powell's contentions, nothing in Supreme Court Rule 10 precludes review. That rule lists considerations involved in the decision-making process for granting certiorari review and provides potential reasons for granting certiorari, but notes that these reasons are "neither controlling" nor fully exhaustive. Sup. Ct. Rule 10. The rule does not restrict this Court's ability to grant certiorari, a decision that Congress has placed firmly "within the Court's discretion." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950).

As these cases demonstrate, an evenly divided decision of the Wisconsin Supreme Court affirming an unpublished Wisconsin Court of Appeals opinion does not preclude the grant of *certiorari*.

Finally the lower court decision denied the petitioners' qualified immunity defense. Therefore it is a final judgment properly before this Court for review. *Behrens v. Pelletier*, 516 U.S. 299, 307-08 (1996); *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

II. STATE AND FEDERAL COURTS ARE DIVIDED AND CONFUSED ON WHETHER THERE IS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN CONTINUING A POST-SECONDARY EDUCATION.

This Court has never found that a student has a constitutionally protected property interest in continuing in a post-secondary education program. Both the federal and state courts are divided on the issue, and this division reinforces the need for the Court to grant this petition and clarify the law for students, educators and the lower courts.

More important, by the present petition satisfies the rule because "a state court . . has decided an important question of federal law that has not been, but should be, settled by this court." Sup. Ct. Rule 10(c). The petition also satisfies the rule because "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. Rule 10(b).

Powell asserts that "most courts have found a constitutional property interest in the continuance of a college education, once begun."*(sic)*, (Respondent's Brief in Opposition at p. 11) The cases Powell cites, however, do not agree on this proposition, but rather reflect the confusion in the law that requires the grant of *certiorari* here.

For example, the court in *Unger v. National Residents Matching Program*, 928 F. 2d 1392, 1399 (3d Cir. 1991) actually found that *no* property right existed. Other cited cases suggest the existence of a constitutionally protected right, but only in *dictum*. *Siblerud v. Colorado State Board of Agriculture*, 896 F. Supp. 1506, 1513 (D. Colo. 1995); *Stevens v. Hunt*, 646 F. 2d 1168, 1169-70 (6th Cir. 1981); *Anderson v. University of Wisconsin* , 665 F. Supp. 1372, 1396 (W.D. Wis. 1987), *aff'd* 841 F.2d 737 (7th Cir. 1988); *Martin v. Helstad*, 699 F. 2d 387, 390 (7th Cir. 1983); *Martin v. Helstad*, 578 F. Supp. 1473, 1480 (W.D. Wis. 1983). One case, *Akins v. Board of Governors of State Colleges and Universities*, 840 F.2d 1371, 1376 (7th Cir. 1988), *vacated on other grounds*, 488 U.S. 920 (1988), specifically holds the issue is still an open question.

The cases Powell cites that *do* recognize the existence of a property right uniformly exhibit a dearth of legal reasoning and precedent in support of their holdings, and have either been questioned by later cases in the jurisdiction or predate this Court's decisions in *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985) and *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978). *See: Stoller v. College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd per curiam, without decision*, 727 F.2d 1101 (3d Cir. 1984); *Abbariao v. Hamline University School of Law*, 258 N.W. 2d 108, 112 (Minn. 1977); *Evans v. West Virginia Board of Regents*, 165 W. Va. 780, 271 S.E.2d 778, 781-82 (W.Va. 1980); *Gaspar v.*

Bruton, 513 F. 2d 843, 850 (10th Cir. 1975); *Hall v. University of Minnesota*, 530 F. Supp. 104, 107-108 (D. Minn. 1982); *Harris v. Blake*, 798 F.2d 419, 422 (10th Cir. 1986). To the extent that these jurisdictions do recognize a constitutionally protected property interest in continuing in a post-secondary education program, they do not reflect the controlling view. Considered against the body of decisions in the area, they serve to highlight the overall confusion in the law on this issue.

Powell's arguments based on *Frank v. Marquette University*, 209 Wis. 372, 377, 245 N.W. 125, 127 (1932) similarly reflect the confusion about the nature of the property interest involved here. Powell contends that *Frank* "stands for the proposition that a student has a constitutionally protected property interest in continuing a graduate school education that a college, state or private, cannot interfere with in an arbitrary or capricious manner." (Respondent's Brief in Opposition, pp. 8-9). The Wisconsin Court of Appeals relied, in part, on *Frank* to find that Powell enjoyed a constitutionally protected property interest. (Appendix 16a-17a) Yet a review of the *Frank* decision demonstrates that both the Court of Appeals and Powell have misread it. It has no relevance here.

Frank was expelled from Marquette University, a *private* institution. He sued on a contract theory to get copies of records of disciplinary actions taken against ten students who graduated. The Due Process clause protects individuals against *government* action. *U.S. v. Salerno*, 481 U.S. 739, 746 (1987). Because *Frank* did not involve any government action, it does not have constitutional implications.

Powell's reliance on Ch. 36, Wis. Stats., to support the notion that there is a property interest in continuing a higher education, is similarly misplaced. (Respondent's

Brief in Opposition at pp. 6, 9, 10) Powell points to *Martin v. Helstad,* 699 F.2d at 399, n.3, and *Harris v. Blake*, 799 F.2d 419, 422 (10th Cir. 1986), to argue that the state law establishing the University of Wisconsin System creates a property interest in continuing in an education program.

Powell reads *Martin v. Helstad* too broadly. The two *Martin v. Helstad* opinions relied on the definition of "student" in Ch. 36 to reject the plaintiff's claim that he had a constitutional right to *admission* to an institution of higher education. The statements in these decisions concerning any property interest in *continuing* in a higher education program were *dicta. Martin v. Helstad,* 699 F.2d 387, 390 (7th Cir. 1983); *Martin v. Helstad,* 578 F.Supp.1473, 1480 (W.D. Wis. 1983). *Harris* is distinguished because it arose out of the 10th Circuit, and did not construe the Wisconsin statute. *Harris v. Blake,* 799 F.2d at 422. It does not establish that a property interest exists in Wisconsin. State law defines a property interest. *Bishop v. Wood,* 426 U.S. 341, 344 (1976) In any event, both the Seventh Circuit and the District Court have subsequently ruled that it is an open question whether a constitutionally protected property interest in continuing in a graduate school program exists. *Osteen v. Henley,* 13 F.3d 221, 226 (7th Cir. 1993); *Akins v. Board of Governors of State Colleges and Universities*, 840 F.2d at 1376, *vacated on other grounds* 488 U.S. 920 (1988); *Shudooh v. University of Wisconsin-Madison*, (Case No. 00-C-0267-C) (W.D. Wis., April 4, 2001) (Unpublished).

The Wisconsin courts' confusion over the existence of a constitutionally protected property interest under Wisconsin law, and the split of opinion among and within federal and state courts as to whether a constitutionally protected property right exists, demonstrate the need for this Court to accept this petition and settle the issue.

III. THE LOWER COURTS IMPROPERLY RECOGNIZED A SUBSTANTIVE DUE PROCESS RIGHT TO REVIEW OF ACADEMIC DECISIONS

This Court has never found a substantive due process right to review of academic decisions.[2] Rather, it has merely *assumed* the right exists for purposes of argument. *Ewing*, 474 U.S. at 223; *Horowitz*, 435 U.S. at 91-92. In finding such a right, the Wisconsin Court of Appeals did not respect the narrow scope of substantive due process review this Court has laid out. Substantive due process analysis is largely confined to "marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 271-272 (1994). The Wisconsin Court of Appeals failed to locate the claimed right as one "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist" without it. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Surely, requiring Powell to inform her guidance and counseling practicum supervisor of her manic-depressive disorder threatens none of our nation's history and traditions or the survival of liberty and justice.

The Wisconsin Court of Appeals misread *Ewing* and *Horowitz* in finding a substantive due process right to review

---

[2] As Justice Powell noted in his concurring opinion in *Regents of University of Michigan v. Ewing*, the student's claim to a property right is "dubious at best". Powell wrote: "Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process . . . . The interest asserted by respondent - - an interest in continued enrollment . . . is essentially a state-law contract right. It bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution." *Ewing*, 474 U.S. at 229-30.

academic decisions. The Court of Appeals overrode faculty judgment without showing that the judgment was "such a substantial departure from accepted academic norms as to demonstrate that the person or committee did not actually exercise professional judgment". In doing so, it failed to "show great respect for the faculty's professional judgment". *Ewing*, 474 U.S. at 225; *Horowitz*, 435 U.S. at 96 n.6. (App. 23a)

The decisions of the Wisconsin Supreme Court and the Court of Appeals threaten the academic freedom of colleges and universities to make professional judgments regarding students and curriculum that they, not the courts, are uniquely qualified to make.[3]

IV. A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN CONTINUING A POST-SECONDARY EDUCATION WAS NOT CLEARLY ESTABLISHED IN 1991.

Given the inability of the Wisconsin Supreme Court to agree as to whether such a right existed in 1991, it goes without saying that such a right was not "clearly established" when the petitioners acted in 1991. Three years previously, in 1988, the U. S. Seventh Circuit had squarely held that "no case from this court establishes" a constitutionally protected property interest in continuing a post-secondary education. *Akins v. Board of Governors of State Colleges and Universities*, 840 F.2d at 1376, *vacated on other grounds*

---

[3] Powell cites no case law, and petitioners are aware of none, to support her contention that the decision to require her to disclose her manic depressive condition was disciplinary and not academic. Powell's argument must be rejected as *ipse dixit*.

488 U.S. 920 (1988). The *Akins* court granted qualified immunity to the university defendants after surveying the law in the other lower federal courts and determining a university administrator would have concluded that no property right existed. *Akins*, 840 F.2d at 1376. The Seventh Circuit next addressed the issue in 1993. The court again acknowledged that the existence of a property right was an open question in the circuit. *Osteen v. Henley,* 13 F.3d at 226. Furthermore, after *Akins* and up until petitioners' actions in 1991, nothing occurred in the law of the other federal circuits and state appellate courts that would have indicated to a university official that *Akins* was no longer controlling in the Seventh Circuit. Thus, at the time the petitioners acted in 1991, the Seventh Circuit did *not* recognize a constitutionally protected property interest in continuing a college education, and had in fact granted qualified immunity to university defendants on that basis.

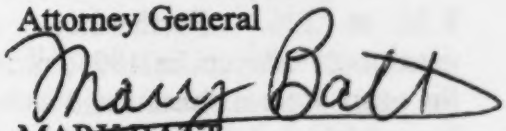
Powell's contention, and the finding of the lower courts, that a constitutionally protected property interest in continuing in a post-secondary education, was clearly established in 1991, is without merit. In 1991, the Seventh Circuit did *not* recognize such a right. *Akins,* 840 F.2d at 1376. There was not a "sufficient consensus", based on all relevant case law, to put a university administrator on notice of unlawful conduct. *Landstrom v. Illinois Dep't of Children,* 892 F.2d 670, 676 (7th Cir. 1990). No state or federal opinion decided after *Akins,* but before this case arose, would have caused a university administrator to question the *Akins* holding. The Wisconsin Supreme Court erred in denying petitioners qualified immunity on grounds that the law was clearly established. The two lower Wisconsin courts have held these petitioners to a standard of legal knowledge that even the Wisconsin State Supreme Court could not agree upon.

CONCLUSION

For the reasons discussed above and in the petition, this Court should issue a writ of *certiorari*.

Respectfully Submitted,

JAMES E. DOYLE
Attorney General



MARY BATT
Assistant Attorney General
State Bar No. 1017859
Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1001